

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

HEARST MAGAZINES MEDIA, INC.

and

**WRITERS GUILD OF AMERICA, EAST,
INC.**

Case No. 02-RC-252592

**EMPLOYER HEARST MAGAZINE MEDIA, INC.'S MOTION FOR
PERMISSION TO FILE AN APPEAL TO THE REGIONAL DIRECTOR OF
THE HEARING OFFICER'S DECISION GRANTING PETITION TO REVOKE
SUBPOENA DUCES TECUM NO. B-1-17K7AAL**

Employer Hearst Magazine Media, Inc. ("Hearst") requests under 29 C.F.R. § 102.65(c) that Regional Director John J. Walsh, Jr., grant permission to appeal directly the ruling of the Hearing Officer granting the petition filed by the Writers Guild of America, East, Inc. (the "Union") to revoke Subpoena Duces Tecum No. B-1-17K7AAL (the "Subpoena"). The Subpoena seeks a copy of a list of eligible voters that the Union prepared and has previously submitted ex parte to an agent of the Board (the "List").

BACKGROUND

The Subpoena was issued by the Board on December 16, 2019. In the Subpoena, Hearst seeks from the Union a single document: "The list of 552 proposed bargaining unit members submitted by [the Union] to the National Labor Relations Board in Case No. 02-RC-252592." Subpoena at Attachment p. 1. The Union filed its Petition to Revoke the Subpoena on December 31, 2019 (the "Petition to Revoke"). Hearst filed its Opposition to the Union's Petition to

Revoke on January 9, 2020 (the “Opposition”). This morning, January 10, 2020, the Hearing Officer issued an oral ruling revoking the Subpoena.¹

The Hearing Officer explained his ruling: “I find that the subpoena should be revoked as the requested document . . . is irrelevant to the matters at hand.”² The Hearing Officer did not address any of Hearst’s arguments for the documents’ relevance, which it had argued in its January 9 Opposition.

Hearst now seeks the Regional Director’s review of that decision. *See* 29 C.F.R. § 102.65(c). The Hearing Officer’s comments on the record imply that Hearst has permission to appeal the ruling directly to the Regional Director. *See id.* But because that permission is not entirely clear, in an abundance of caution, Hearst files this request for permission to appeal.

ARGUMENT

The Hearing Officer’s silence on Hearst’s contrary arguments is, standing alone, a basis to allow Hearst to file an appeal. Moreover, the Hearing Officer’s conclusion misunderstands Hearst’s interest in the Union’s list. The list is relevant for two reasons explained in the proposed appeal, which is attached hereto as Exhibit A. For one thing, a key question in the representation hearing is whether the individuals whom the Union seeks to represent can appropriately be included in a single bargaining unit, as the Union contends. The Union’s proposed member list is a foundational statement of the Union’s position on that key question.

¹ The Union’s Petition to Revoke the Subpoena (the “Petition to Revoke”) is in the record of this proceeding as Board Exhibit 5A. Hearst’s Opposition to the Union’s Petition to Revoke is in the record as Board Exhibit 5B.

² The official record of the hearing on January 10, 2020, is not yet available. Quotations herein are based on counsel’s contemporaneous notes.

In that sense, the Union has provided its position to the Board but has not provided it to Hearst. It is difficult to imagine a more relevant document than the Union's ex parte submission in which it described to the Board the unit on which its requested unit is based.

An additional, and entirely independent, basis for relevance is the ongoing litigation in this case over individuals' supervisory status. The Regional Director has ruled that six individuals' supervisory status will be litigated in the ongoing representation hearing. Representation Hearing Transcript at 14:17-25, 533:6-12. Whether and how those six individuals are reflected on the Union's list is of critical relevance to litigating their eligibility. After all, if the Union itself does not consider one or more of those six disputed supervisors to be eligible voters in the proposed unit, the list will be evidence of their ineligibility or will constitute the Union's waiver. And besides, there is the issue of 86 disputed supervisors at the center of Hearst's Request for Review that is currently pending before the Board.

Indeed, the Union acknowledges that its List does not match up with the list that Hearst has already provided. The Union's List contains at least two dozen names that do not appear on any Hearst list, and it is not at all clear (because the Union will not say) that all of the names on Hearst's lists appear on the Union's List. Thus there is indisputably a genuine disagreement about which individuals should be included in any bargaining unit, the contours of which are the exact question that the Union's list may help to answer.

CONCLUSION

For reasons stated above and in the proposed appeal, Hearst is likely to prevail on appeal. In any event, it is entitled to a ruling that addresses its arguments. The Regional Director should therefore grant permission to appeal directly.

PROSKAUER ROSE LLP
ELEVEN TIMES SQUARE
NEW YORK, NY 10036-8299
Tel. (212) 969-3000
Fax (212) 969-2900

Attorneys for Hearst Magazines Media, Inc.

By: Mark W. Batten

Dated: January 12, 2020

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

HEARST MAGAZINES MEDIA, INC.

and

**WRITERS GUILD OF AMERICA, EAST,
INC.**

Case No. 02-RC-252592

**APPEAL TO THE REGIONAL DIRECTOR OF
THE HEARING OFFICER'S DECISION GRANTING PETITION TO REVOKE
SUBPOENA DUCES TECUM NO. B-1-17K7AAL**

Employer Hearst Magazine Media, Inc. (“Hearst”) respectfully submits this direct appeal under 29 C.F.R. § 102.65(c) to Regional Director John J. Walsh, Jr., appealing the decision of the Hearing Officer to grant the petition filed by Petitioner Writers Guild of America, East, Inc. (the “Union”) to revoke Subpoena Duces Tecum No. B-1-17K7AAL (the “Subpoena”). The Subpoena seeks a copy of a list of eligible voters that the Union prepared and has previously submitted ex parte to an agent of the Board (the “List”).¹

PRELIMINARY STATEMENT

The Hearing Officer revoked the subpoena based solely on a finding that the requested document is irrelevant. But the Hearing Officer never explained that finding, and it cannot be squared with a full understanding of the disputes currently pending in this case.

The Hearing Officer apparently relied on his power to revoke the subpoena if “the evidence whose production is required does not relate to *any matter* under investigation or in question in the proceedings.” 29 C.F.R. § 102.66(f) (emphasis added). The List does not even come close to satisfying that condition for revocation. The List articulates the Union’s position on each of several open issues, yet it has been shared only with the Board and not with Hearst.

The requested List contains the most basic information about how the Union has articulated its own proposed bargaining unit to an agent of the Board. The List — at least as it has been represented to Hearst by the Union — merely identifies 552 employees whom the Union contends should be eligible to vote. Hearst has provided its list, and the Union concedes that the two lists are not the same: there are at least two dozen individuals on the Union’s list who are not on Hearst’s, and it is not clear that all of those on Hearst’s list are on the Union’s.

¹ The Union’s Petition to Revoke the Subpoena (the “Petition to Revoke”) is in the record of this proceeding as Board Exhibit 5A. Hearst’s Opposition to the Union’s Petition to Revoke is in the record as Board Exhibit 5B.

Hearst merely seeks to resolve these issues, and the Union's Petition to Revoke offers no explanation for its unwillingness to engage in a dialogue about this central issue.

ARGUMENT

A. The List is relevant to this proceeding.

In revoking the subpoena, the Hearing Officer did not explain why he views the List as irrelevant. Nor did he articulate what he views as the "matter[s] under investigation in the proceedings," 29 C.F.R. § 102.66(f), which would allow an analysis of whether and why the List is excluded from that category. The ruling suggests that the Hearing Officer must have taken an excessively narrow view of relevance, misapprehending the full context of this proceeding and the usefulness of the List in narrowing the areas in dispute.

As to one issue that the Regional Director has placed at issue in this proceeding, the List is not just relevant but may even be dispositive. Specifically, the Regional Director has ordered that the representation hearing will include litigation over six individuals' supervisory status. Representation Hearing Transcript at 14:17-25, 533:6-12. Whether and how those six individuals are represented on the Union's list is of critical relevance to litigating their eligibility. For example, if the Union itself does not consider one or more of those six disputed supervisors to be members of the proposed unit, the list will be evidence of their ineligibility or will constitute the Union's waiver.

The List would also shed light on the other 86 disputed supervisors. Although the Regional Director has prevented Hearst from litigating those individuals' supervisory status, Hearst's arguments remain alive, as the Regional Director's decision is currently on appeal to the Board. The record in this proceeding cannot close until that appeal is acted upon. Indeed, the Hearing Officer has urged the parties to postpone litigating the status of the six supervisors

whom the Regional Director has permitted Hearst to assert until the end of the evidence because of the pending appeal. Confirming the relevance of the List, *the Union has now made assertions about the List to the Board itself* in opposing Hearst's pending appeal. See, e.g., Pet'r's Opp'n to Employer's Request for Board Review, filed Jan. 3, 2020, at 6 n.3.

The List also is relevant to the issue currently being litigated, about the scope of the appropriate bargaining units. The goal of the hearing in that regard is to determine whether the individuals whom the Union seeks to represent can appropriately be included in a single, enormous bargaining unit spanning four states, or should be represented in several smaller units better tailored to their individual interests. See *PCC Structural, Inc.*, 365 NLRB No. 160 fn. 8.² Knowing whom the Union includes in its petitioned-for unit could only help clarify that inquiry.

Indeed, the Union acknowledges that its List does not match up with the list that Hearst has already provided; the Union's List contains at least two dozen names that do not appear on any Hearst list, and it is not at all clear (because the Union will not say) that all of the names on Hearst's lists appear on the Union's List. Thus there is indisputably a genuine disagreement about which individuals should be included in any bargaining unit, even apart from the known disputes about supervisors, employees in Best Products, and the members of the Hearst International Employees Association.

² "As the Board observed 55 years ago: 'As we view our obligation under the statute, it is the mandate of Congress that this Board "shall decide in each case . . . the unit appropriate for the purpose of collective bargaining."...Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, *if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.*'"

Tellingly, the Hearing Officer recently conveyed an inquiry from the Region to both parties: “does the petitioned-for unit encompass the entire organization of Hearst Magazine Media?” Representation Hearing Transcript at 1192:22-1193:5. The Region’s inquiry further demonstrates the uncertainty that permeates this proceeding. If both parties knew precisely which individuals the hearing concerns, that information would likely speed resolution of the disputed issues.

B. The Union’s other arguments would have provided no basis to revoke.

Although not the basis of the Hearing Officer’s ruling, the Union had offered two additional arguments in its Petition to Revoke. Neither is valid.

First, the Union contends that the List should remain secret because the Union initially provided a copy to the Region under an “explicit assurance that it would not be provided to the Employer.” Petition to Revoke at 3. Whatever the merits of the Region’s apparent promise, that promise is not at issue here, because Hearst seeks the List from the Union directly. The mere fact that the Region also has a copy, and purportedly promised to keep that copy a secret, does not immunize the document from a subpoena to the Union.

Second, the Union argued that the List contains confidential information, but never explained what, exactly, is confidential about a list of eligible voters. Petition to Revoke at 5. The Union’s straw-man argument first proposes, without elaboration, that Hearst would “likely assume” that the List “includes those who have been active in the Union’s organizing campaign.” *Id.* Why Hearst would make such an assumption, or whether it would be an accurate assumption or not, the Union does not say. In any event, that opaque argument makes no sense. The Union and the Region have already disclosed that the List contains 552 names — the entire petitioned-for unit, including nearly 100 supervisors, members of another union, and other individuals whom Hearst contends should be excluded. The inclusion of an individual on

that list says nothing about that person's protected concerted activities. For the same reason, the NLRB's "practice of not disclosing documents indicating union support," Petition to Revoke at 5-6, has nothing to do with Hearst's request for a list of voters. *Cf. National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (explaining that the Board's tradition of protecting confidential employee information contained in authorization cards is intended to prevent the potential "chilling" effect on employees' willingness to sign authorization cards if the employer would be able to see who signed). The List contains no confidential information and should be produced.

CONCLUSION

The List is directly relevant and must not be shielded from production. The Regional Director should reverse the Hearing Officer's ruling and order the Union to comply with the Subpoena.

PROSKAUER ROSE LLP
ELEVEN TIMES SQUARE
NEW YORK, NY 10036-8299
Tel. (212) 969-3000
Fax (212) 969-2900

Attorneys for Hearst Magazines Media, Inc.

By: Mark W. Batten

Dated: January 12, 2020

UNITED STATES
NATIONAL LABOR RELATIONS BOARD

HEARST MAGAZINE MEDIA, INC.

Employer,

and

WRITERS GUILD OF AMERICA EAST, INC.,

Petitioner.

Case No. 02-RC-252592

CERTIFICATE OF SERVICE

I, Mark Batten, an attorney, hereby certify that on January 12, 2020, I caused true and complete copies of the Employer's Motion for Permission to File an Appeal to the Regional Director and the Employer's Appeal to the Regional Director to be served by the methods indicated below, upon the following persons at the following addresses:

By E-File

Mr. John J. Walsh, Jr.
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza
New York, NY 10278

By Electronic Mail

Eric Greene, Esq.
Spivak Lipton LLP.
1700 Broadway
New York, NY 10019
egreene@spivaklipton.com

PROSKAUER ROSE LLP:

Mark W. Batten

Mark W. Batten
Eleven Times Square
New York, NY 10036-8299
Tel: (212) 969-3000
Fax: (212) 969-2900
Attorneys for Hearst Magazine Media, Inc.